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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 588

RAPHAEL R. RICHARDSON, PETITIONER

v.

THEODORE BRITTON, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND ON MOTION FOR PERMISSION TO WAIVE PRINTING OF RECORD AND PETITION FOR WRIT OF CERTIORARI AND LEAVE TO FILE TYPEWRITTEN COPIES IN LIEU THEREOF

BRIEF FOR RESPONDENT BRITTON IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The order of the District Court (R. 23) was not accompanied by an opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 85) is reported at 192 F. 2d 423.

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1951 (R. 86). On January 15, 1952, by order of the Chief Justice, the time within which to file a petition for a writ of certiorari was extended to and including February 15, 1952. The petition was filed on February 15, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the administrative findings of fact of the Deputy Commissioner are supported by substantial evidence on the record considered as a whole.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 11-15.

STATEMENT

Petitioner was employed as a messenger by the intervenor Western Union Telegraph Co. from November, 1943, until February, 1946 (R. 56, 64). While driving to work on March 31, 1945, he was injured in an automobile collision (R. 85). He notified Western Union by telephone that he would not be able to report to work as the result of an automobile accident (R. 83), but did not make any written report (R. 10, 68). He resumed his work with Western Union about two or three weeks later (R. 10, 60).

A medical examination by a brain specialist in November, 1945, disclosed that petitioner was suf-

fering from Parkinson's disease (R. 42), which is a slowly progressing disorder of the basal ganglia in the brain. (R. 85). It is characterized by a group of symptoms such as a masking of the face; typical gait, hand-writing, and speech; lack of animation; tremor; muscular rigidity and weakness (R. 35).

On December 16, 1947 petitioner filed a claim for workmen's compensation [1] under the Longshoremen's and Harbor Workers' Act of 1927 (hereinafter referred to as the Act) [2] alleging that his ailment had been caused by the automobile accident in which he had been involved on March 31, 1945 (R. 85).[3] The Deputy Commissioner denied the claim. He found that, while petitioner's employment with Western Union was covered by the Act, (1) the automobile accident had not caused the illness, and (2) the latter had not, in any event, arisen out of and in the course of petitioner's employment. In addition, he held that petitioner had failed to submit the written report of accident required by Sec. 12 of the Act (*infra*, pp. 11-12, 33 U.S.C. 912; cf. 20 C.F.R. Sec. 41.3) and that the claim was barred since it had not been filed within

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[1] During the intervening period petitioner had brought an action, which ultimately proved unsuccessful, against the owner of the other car involved in the accident. (R. 10, Pet. 3.)

[2] 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*; made applicable to certain types of employment in the District of Columbia by the Act of May 17, 1928, 45 Stat. 600; D.C. Code 36-501 (*infra*, p. 15).

[3] The claim also alleged an accident which had occurred on January 20, 1946 (cf. R. 85, n. 2). The petition, however, does not refer to it.

one year after the injury (Sec. 13(a) of the Act, *infra*, p. 12, 33 U.S.C. 913(a)). (R. 9-11).

Petitioner sought judicial review of this adverse determination by filing in the United States District Court for the District of Columbia a complaint for mandatory injunction against the respondent Britton pursuant to Sec. 21 of the Act (*infra*, pp. 12-13, 33 U.S.C. 921) (R. 1-5).[4] Upon motions for summary judgment made by respondents Britton and Western Union (R. 17-18, 21), the District Court dismissed the complaint (R. 23).

The Court of Appeals affirmed on the ground that there was substantial evidence on the record considered as a whole to support the finding that petitioner's disability had not been caused by the accident. Observing that this finding disposed of the entire case, the Court did not discuss the other three grounds on which the Deputy Commissioner had based the dismissal of the claim (R. 85).

ARGUMENT

Petitioner asks this Court to grant review on two grounds. He claims, first, that the court below erred in evaluating the substantiality of the evidence supporting the commissioner's finding that the automobile accident did not cause petitioner's Parkinson's disease and, second, that the court below erred in not passing on the further questions he raises. We submit that the decision of the

[4] A motion of Western Union for leave to intervene (R. 19) was apparently granted.

court below on the issue of causation was clearly correct and that it does not raise any question ordinarily reviewed by this Court under its certiorari jurisdiction. The other issues—scope of employment, failure to report the accident, and the statute of limitations—likewise turn on the Deputy Commissioner's findings of fact, are largely academic in view of the finding that the accident did not cause petitioner's Parkinson's disease, and refer only to a relatively insignificant (and extremely belated) claim for two or three weeks' compensation. In any event, they were correctly decided by the Deputy Commissioner.

1. The question whether petitioner's disability was caused by the March 31, 1945, accident was vigorously contested before the Deputy Commissioner. Both parties introduced a substantial amount of conflicting medical evidence (R. 25-55).[5]

[5] Petitioner's attempt to prove that in his case Parkinson's disease was caused by the accident was, at best, inconclusive. The experts who testified that in their opinion petitioner's illness was brought about by the accident because the case history did not indicate any other possible cause indicated that petitioner had failed to mention to them the fact that even prior to the accident he had experienced difficulties in walking, and were not aware that the doctor who had treated petitioner had noticed in him the day after the accident the typical gait and facial expression of Parkinson's disease (R. 26-28, 41, 46). Dr. Lambros, testifying on behalf of petitioner, stated that in his opinion, the disease was caused by a blow on petitioner's head suffered during the accident (R. 44-46). The evidence, however, indicated that petitioner had not suffered any such blow (R. 85). The same witness testified that the disease was most frequently caused by a hardening of the arteries (R. 44), and that petitioner was not suffering from such a disorder (R. 44). But there was testimony emphatically showing that petitioner was in fact afflicted with hardening of the arteries (R. 51).

In these circumstances the Deputy Commissioner alone was empowered to draw an inference either way (*Del Vecchio* v. *Bowers,* 296 U.S. 280, 287), and his determination of the facts is to be accepted unless it is unsupported by substantial evidence on the record considered as a whole (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474; *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 508). The court below found that the Deputy Commissioner's finding was clearly supported by substantial evidence (R. 85). Petitioner asks this Court again to review the evidence and the inferences drawn from it. This Court has consistently indicated that it will not issue its writ of certiorari for such purposes. *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393; *National Labor Relations Board* v. *Pittsburgh SS Co.,* 340 U.S. 498, 502-503.

2. Petitioner argues that a finding to the effect that his Parkinson's disease was not caused by the accident does not completely dispose of the case, since he would still be entitled to compensation for the two or three weeks he was incapacitated after, and as a result of, the accident (R. 60). Even if this vestigial claim warranted further consideration here, it would be barred by the Deputy Commissioner's findings that (a) petitioner's injury in the automobile accident did not arise out of and in the course of his employment and (b) petitioner failed to comply with the statutory requirement that he file written notice of his injury with

the Deputy Commissioner and the employer within thirty days after the accident. Sec. 12 of the Act (33 U.S.C. 912) (*infra*, pp. 11-12). We submit that both of these findings, each independently sufficient to defeat petitioner's claim, are clearly correct.

(a) The Deputy Commissioner properly found that the injury did not arise out of and in the course of the employment.[6] The accident occurred while petitioner was on his way to work; hence it was not of the type which would ordinarily be compensable, cf. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 479-480; *Voehl* v. *Indemnity Insurance Co.*, 288 U.S. 162, 169. Of the several exceptions to this rule (*Cardillo* v. *Liberty Mutual Insurance Co., supra*, at 480) the only one petitioner seeks (Pet. 6-8, 11-13), or could conceivably seek, to have applied here is the exception for cases where, under the terms of the employment contract, the travel time becomes part of the compensated service. *Voehl* v. *Indemnity Insurance Co., supra*, at 169-170, *Cardillo* v. *Liberty Mutual Insurance Co., supra* at 480. Bearing on this contention, there was conflicting testimony with respect to a bonus paid to petitioner. He claimed that it constituted payment for travel time (R. 56-57); a witness for the employer testified that it constituted an incentive bonus to encourage employees to work

[6] When the Act uses the term "injury" it means "accidental injury or death arising out of and in the course of employment . . ." Sec. 2(2), 33 U.S.C. 902(2).

regularly and that it was not supposed to cover travel time (R. 75, 76-80). The Deputy Commissioner accepted the employer's version of the purpose of the bonus and accordingly ruled that the injury did not arise out of and in the course of petitioner's employment. We submit that the Deputy Commissioner's decision as to the weight of the evidence is not a proper subject of further review. *Del Vecchio* v. *Bowers,* 296 U.S. 280, 287; *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 477-481; *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 509.

(b) Assuming, however, for the sake of argument, that the accident occurred in the course of his employment, petitioner still can not prevail in view of his failure to comply with the statutory requirement of filing written notice of the injury with the Deputy Commissioner and the employer within thirty days after the accident. Sec. 12 of the Act (33 U.S.C. 912). Failure to give such notice bars the claim unless (a) the employer had knowledge of the injury and was not prejudiced by the failure to give the notice, or (b) the Deputy Commissioner excuses the omission "on the ground that for some satisfactory reason such notice could not be given * * *." Sec. 12(d).

In the instant case the Deputy Commissioner did not excuse the failure to give the notice (R. 11). The oral notice given by petitioner that he could not report to work on account of the accident did not comply with the statutory requirement that it be

in writing, and did not advise the employer of the fact or petitioner's claim that the injury arose out of and in the course of the employment (R. 10-11, 83).[7]

Failure to give the statutory written notice thus seriously prejudiced the employer. Judging from the information available to it, this accident had no connection with petitioner's employment. It could not anticipate that petitioner would seek to hold it responsible, if he could not obtain relief from the owner of the other car involved in the accident. Had petitioner given the statutory notice, the employer could have protected itself by filing a report pursuant to Section 30, thus preventing the suspension of the running of the statute of limitations.[8]

The law does not confer upon a claimant the power indefinitely to postpone the running of the statute of limitations by delaying the filing of a notice advising the alleged debtor of the existence

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[7] As a matter of fact petitioner took a position quite inconsistent with such a contention. He sued the owner of the vehicle with which he collided without giving the notice required by Sec. 33 of the Act (33 U.S.C. 933), which he should have done, and presumably would have done, had he believed that his injury was compensable.

[8] The finding that the employer was not advised and did not know that petitioner had suffered a compensable injury automatically disposes of the argument that the claim is not barred by the statute of limitations. Concededly, the claim was filed more than a year after the accident. The tolling provision of Sec. 30(f) of the Act (*infra*, pp. 14-15, 33 U.S.C. 930(f)) can not aid petitioner since it is applicable only where the employer knows of the injury and is in default in reporting it.

of a claim. *McMahon* v. *United States*, 342 U.S. 25, 27; cf. *Phillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict with the pertinent federal decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1952.

APPENDIX

1. The Longshoremen's and Harbor Workers' Compensation Act of 1927 (44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*), made applicable to the District of Columbia by the Act of May 17, 1928, Sec. 1 (*infra*, p. 15, 45 Stat. 600, D.C. Code 36-501) provides in pertinent part:

Sec. 12 (44 Stat. 1431, 33 U.S.C. 912).

(a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in

charge of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

Sec. 13(a) (44 Stat. 1432, 33 U.S.C. 913(a)).

(a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

Sec. 21 (44 Stat. 1436, 33 U.S.C. 921).

(a) A compensation order shall become effective when filed in the office of the deputy

commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

Sec. 30 (44 Stat. 1439, as amended by the Act of June 25, 1938, Sec. 11, 52 Stat. 1167, and Reorganization Plan No. 19 of 1950, Sec. 1, 15 F.R. 3178, 33 U.S.C. 930).

(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day and hour when and the particular locality where the injury or death occurred; and (5) such other information as the commission may require. A copy of such report shall be sent at the same time to the deputy commissioner in

the compensation district in which the injury occurred.

(b) Additional reports in respect of such injury and of the condition of such employee shall be sent by the employer to the commission and to such deputy commissioner at such times and in such manner as the Secretary may prescribe.

(c) Any report provided for in subdivision (a) or (b) shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made.

(d) The mailing of any such report and copy in a stamped envelope, within the time prescribed in subdivisions (a) or (b), to the Secretary and deputy commissioner, respectively, shall be a compliance with this section.

(e) Any employer who fails or refuses to send any report required of him by this section shall be subject to a civil penalty not to exceed $500 for each such failure or refusal.

(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 13 of this Act shall not begin to run against the claim of the injured employee or his dependents entitled to

compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

2. The Act of May 17, 1928, Sec. 1 (45 Stat. 600, D.C. Code Sec. 36-501 provides in pertinent part:

> * * * the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

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